

1  
2 John M. Sears, 005617  
3 P.O. Box 4080  
4 Prescott, AZ 86302  
5 (928) 778-5208  
6 E-mail: John.Sears@azbar.org

7 Attorney for Defendant

YAVAPAI COUNTY COURT  
ARIZONA

2009 NOV -3 PM 1:24

CLERK

*N. Seguir*

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Division 6

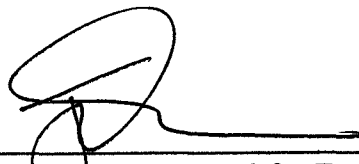
) **NOTICE OF FILING OF  
DECLARATION OF RICHARD  
BURR**

Defendant, STEVEN CARROLL DEMOCKER, by his counsel undersigned,  
herewith files the Declaration of Richard Burr in support of his motion to declare  
portions of the Victim's Rights Act unconstitutional.

DATED this 3<sup>rd</sup> day of November, 2009.

LAW OFFICES OF JOHN M. SEARS, P.C.

By:

  
John M. Sears, Counsel for Defendant  
P.O. Box 4080  
Prescott, Arizona 86302

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ORIGINAL of the foregoing filed  
this 3<sup>rd</sup> day of November, 2009, with:

Jeanne Hicks,  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

COPY of the foregoing hand delivered  
this 3<sup>rd</sup> day of November, 2009 to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
Division 6  
120 S. Cortez  
Prescott, AZ 86303

Joseph C. Butner  
Deputy Yavapai County Attorney



## DECLARATION OF RICHARD H. BURR

Richard H. Burr, under penalty of perjury, declares the following:

1. I am an attorney in private practice in Houston, Texas. My practice has been devoted entirely to the trial, appellate, and post-conviction representation of defendants in capital cases since 1979. I have represented persons in well over one hundred capital cases in twelve states and in the federal courts during this time. Although my work has been heavily oriented toward post-conviction and habeas corpus proceedings, I have been trial counsel in three capital prosecutions, including *United States v. Timothy James McVeigh*, No. 96-CR-68 (D. Colo.) (the Oklahoma City bombing case), where I was lead counsel for the penalty phase and for penalty-related work. I have argued two capital cases in the Supreme Court of the United States, *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Selva v. Lynaugh*, 494 U.S. 108 (1990), and served as co-counsel on two others, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Tennard v. Dretke*, 542 U.S. 274 (2004).

2. Because of my experience, I have been retained by the Office for Defender Services of the Administrative Office of the United States Courts, along with eight other similarly experienced attorneys, to serve through the Federal Death Penalty Resource Counsel project as an advisor and consultant to court-appointed and federal defender attorneys engaged in the defense of capital cases in the federal courts. Through this project, I work extensively with counsel appointed to represent people charged in federal capital cases. In a report by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States, *FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION* (May, 1998) (called the “Spencer Report” after the chair of the committee that authored the report) – which was adopted

by the Judicial Conference – the work of our project was found to be “essential to the delivery of high quality, cost-effective representation in death penalty cases....” *Id.* at 50.

3. Counsel for Steven DeMocker have asked that I explain to the Court the role of defense-initiated outreach (DIVO) in the defense of a person on capital murder charges and how such work has become essential to the representation of capital clients.

4. In the course of representing Timothy McVeigh during 1995-97, I worked with Dr. Howard Zehr, a professor and then-director of the Center for Conflict Transformation at Eastern Mennonite University (EMU) in Harrisonburg, Virginia, and a person who was then a graduate student studying with Dr. Zehr, Tammy Krause, to develop an approach to making contact with the victims and survivors of the Oklahoma City bombing. Dr. Zehr is the leading scholar and practitioner in the field of restorative justice. In contrast to retributive justice, which focuses solely on the punishment of offenders, restorative justice focuses on the harm done by a crime, seeks accountability from the offender, and encourages the offender to recognize his or her obligations to the victim that arise because of the harm done. As noted by Dr. Zehr in *The Little Book of Restorative* 28-29 (2002):

Central to restorative justice is the idea of making things right or, to use a more active phrase often used in British English, ‘putting right.’ As already noted, this implies a responsibility on the part of the offender to, as much as possible, take active steps to repair the harm to the victim.... In cases such as murder, the harm obviously cannot be repaired; however, symbolic steps, including acknowledgment of responsibility or restitution, can be helpful to victims....

Guided by the principles of restorative justice, Dr. Zehr, Tammy Krause, and I developed a method by which the defense team in a capital case could make contact with the survivors of the murder and offer to address the needs and interests of the survivors that the defense was in a unique position to address. This method has evolved considerably in the years since 1997 but

continues to be guided by the principles and ethics of restorative justice. *See, e.g., Burr, Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517 (January 2003); Leonard, “*All But Death Can be Adjusted*”—*Recognizing Victims’ Needs in Death Penalty Litigation*, THE CHAMPION 40 (National Association of Criminal Defense Lawyers, December 2006); Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should Be Concerned About Victims and Survivors*, THE CHAMPION 44 (National Association of Criminal Defense Lawyers, December 2006); Krause, *Reaching Out to the Other Side: Defense-Based Victim Outreach in Capital Cases*, in James R. Acker & David R. Carp, WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (2006); Branham and Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 Hofstra L. Rev. 1019 (Spring 2008).

5. From the perspective of restorative justice, a murder creates an involuntary relationship between the survivors of the murder victim and the offender. This relationship is defined by the needs the survivors have that can only be met by the offender – needs for information (such as, what happened, why, details about death and suffering), accountability, and putting right. In turn, the offender is obliged to meet these needs. Because we operate in an adversarial system, where rights must be protected against unwitting waiver, the offender/defendant cannot have a direct relationship with the survivors before the prosecution has concluded. However, the defense team can and is in a unique position to have such a relationship – in essence the defense team, because it represents the offender/defendant, assumes (as a proxy) the obligations that the offender has to the survivors. For these reasons, defense teams are obliged to try to meet their client’s obligations to the survivors to the extent possible.

6. The underlying relationship between murder survivors and the offender requires defense teams to reach out to survivors even when their clients maintain innocence and are, in fact, innocent. From the survivors' perspective, the person charged is presumably the person who killed their loved one. Survivors have the same needs even if the person charged is actually innocent. Survivors' needs for information can be directly addressed by the defense team when their client is innocent. Indeed, the need for information about innocence is critical to survivors, because they have no interest in the wrong person being held accountable. Moreover, the needs they have for information about the death of their loved one cannot be met by an innocent person, nor can such a person begin to put right the wrong that took place. Thus, while the content of information that will be provided by an innocent defendant in response to questions by survivors is different, the obligation of the defense to respond to survivors' questions is the same. The charging of a person as the defendant puts the defendant in the role of offender insofar as the obligation to address the needs of survivors is concerned.

7. From the perspective of the adversarial process, the defense team is also obliged to have a relationship with the survivors. In a capital case, the victim's family and others who may be considered to be the victim's survivors have an important role at every stage of the process. Survivors are potential witnesses at both phases of the trial, and thus contact with them is an essential part of investigating the case. *See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (Commentaries to Guidelines 10.7 & 10.11). In addition, survivors are often central to the prosecutor's decision to pursue a death sentence and his/her willingness to agree to a negotiated settlement of the case. Accordingly, defense counsel have a responsibility to explore with survivors their interests, which may affect both of these prosecutorial decisions, *see*

Commentary to Guideline 10.9.1 (contact with the family of the victim is often “[a] very difficult but important part of capital plea negotiation”), and to discuss with the defendant ways in which he might be able to address these interests. *See* ABA Guidelines 10.9.1(B)(7) & (8)(g) (in connection with plea discussions counsel “should know and explore with the client” both the “concerns of the [survivors]” and possible “concessions the client might offer such as ... meetings between [survivors] and the client” and “a public statement o[f] remorse, or restitution”).

8. Together, therefore, the role of the defense as proxy for the offender/defendant in the relationship created by a murder, and the requirements of effective representation by the adversarial system, *require* the defense to reach out to the survivors in a capital murder prosecution. The principles and ethics of defense-initiated victim outreach guide the process of reaching out to the survivors in a manner that is respectful and designed not to re-traumatize the survivors. The outreach is designed to ask for nothing from the survivors. It does not seek to persuade them to help the defendant in any respect. It offers only a relationship with the defense team if the survivor is interested in such a relationship, and the relationship it offers is based solely on the potential ability of the defense team to address the survivor’s needs and interests that the defense team is uniquely positioned to address (because of their representation of the defendant).

9. For these reasons, defense-initiated victim outreach has become an essential part of the duty of defense counsel to provide effective representation in a capital case. Counsel provide ineffective assistance if they fail to engage in outreach to murder survivors. *See United States v. Kreutzer*, 59 M.J. 773, 783-84 (Army Ct. Crim. App. 2004) (“defense counsel’s failure to interview the principal victim, who would testify against their client about the devastating

impact his killing of her husband had on her and their eight children, and to discover her extraordinary feelings of forgiveness and her belief that appellant should not be put to death, rendered their performance grossly ineffective on behalf of their client”).

On October 29, 2009, I declare under penalty of perjury that the matters set forth herein are true and correct.

A handwritten signature in black ink, appearing to read "Richard H. Burr", followed by a long horizontal line extending to the right.

Richard H. Burr